PP

v.

CANG CENG TRANSPORT CO

HIGH COURT SABAH & SARAWAK, BINTULU
JOHN KO WAI SENG JC
[CRIMINAL REVISION NO: BTU-43-02-2011]
12 AUGUST 2011

ROAD TRAFFIC: *Overloading - Carrying on lorry load in excess of permitted weight - Respondent as owner of lorry charged for offence under s. 19(1)(b)(vi) read with s. 19(4) Commercial Vehicles Licencing Board Act 1987 - Breach of road transport licence condition - Driver of lorry also charged on same facts for same offence and fined RM1,500 - Decision by Magistrate to discharge and acquit respondent - Prosecution's application for revision of Magistrate's decision - Whether charge against respondent amounts to double jeopardy - Whether respondent a legal entity to be sued or prosecuted - Whether charge framed against respondent is void in law*

CRIMINAL PROCEDURE: *Revision - Criminial revision - Road traffic - Driver and owner of motor lorry seperately charged with overloading offence - Magistrate acquitting owner on grounds of double jeopardy after convicting driver of offence - Whether decision legally flawed - Whether open to revision - Criminal Procedure Code, ss. 323 & 325*

CRIMINAL PROCEDURE: *Prosecution - Authorisation to prosecute - Failure of Road Transport Department to obtain written appointment under s. 376(3A) Criminal Procedure Code by public prosecutor - Whether prosecution of respondent a nullity and void ab initio - Federal Constitution, art. 145(3) - Rajendran M Gurusamy v. PP*

WORDS & PHRASES: *"or" - Commercial Vehicles Licencing Board Act 1987, s. 19(4) - Wording of - Whether the word "or" in the sentence 'the holder of the licence "or" any other person who causes or permits the vehicle to be used' can be read as an 'and' to make both parties liable*

The respondent firm, as licence holder of a lorry, was charged by the Road Transport Department ('JPJ') for an offence under s. 19(1)(b)(vi) Commercial Vehicles Licensing Board Act 1987 ('the Act') read with s. 19(4) of the Act for permitting its driver

A to drive the said lorry which was overloaded with laden weight of 46,700 kg, resulting in a breach of the road transport licence condition. The learned Magistrate had discharged and acquitted the respondent after hearing the preliminary objections raised by it. Hence, the prosecution applied for a criminal revision against
B the Magistrate's decision. The grounds raised by the prosecution herein was that the learned Magistrate had erred in fact and law when it was held that both the respondent and the driver were charged for the same offence under the Act which resulted in double jeopardy. To counter this argument, the respondent
C submitted that since the driver of the lorry had been charged under s. 19(1)(b)(vi) of the Act and fined RM1,500 under s. 19(4) of the Act, the respondent should not be charged on the same facts for the same offence as it amounts to double jeopardy. Further, it was also the respondent's submission that: (i) the
D respondent was not a legal entity to be charged; and (ii) the proceeding was a nullity because the JPJ officers who initiated the proceedings in the name of JPJ did not produce any written authority to the learned magistrate to prove that they are fit and proper person appointed by the public prosecutor to prosecute.

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Held (dismissing revision):

(1) Section 325 of the Criminal Procedure Code ('CPC') states that a judge may exercise his discretionary powers in any case the record of proceedings of which has been called for or by
F himself or which otherwise comes to his knowledge, but a judge cannot convert a finding of acquittal into one of conviction. (para 8)

(2) Applying the literal interpretation of s. 19(4) of the Act, the
G default to be punished was for allowing a person to breach the conditions of the road transport licence. Therefore, the person to be punished was either: (i) the licence holder or (ii) the person who allows the person to breach the licence conditions and not even to both. The word "or" in 'the holder of the
H licence **or** any other person who causes or permits the vehicle to be used' cannot be read as an 'and' to make both liable. (para 18)

(3) Section 19(4) as framed was not meant to include the person
I or user who actually breaches the conditions but rather against the licence holder or the manager/director/proprietor who

causes or permits the use by any person who then breached the licence condition. Hence, to avoid double jeopardy, the driver or user if not the licence holder or manager/director/proprietor should be appropriately charged under s. 19(3) of the Act. There had been a double jeopardy by the lodging of two charges under s. 19(4) of the Act on the one act of overloading against the owner and the driver who presumably is the manager who authorised and permitted himself to drive and has breached the overloading condition. (paras 21-23)

(4) The facts upon which their respective offences under s. 19(4) of the Act were formulated arising from the same breach by the user are the same even though against two different parties. Such formulation would therefore constitute double jeopardy. Hence, the learned Magistrate had not erred in law by allowing the respondent's preliminary objection based on double jeopardy to discharge and acquit the respondent on the basis that there was already a conviction for the same offence from the same breach of condition. (paras 23 & 24)

(5) A firm is an unincorporated association of persons whereby a proprietor who commits an offence should be prosecuted personally for it. The prosecution was instituted against the respondent with no identification of any natural person who was accused to be responsible for the *mens rea* and *actus reus* of the alleged offence. Further, there was no specific provision in the Act to allow a firm to be charged in its own name in order to constitute it as a legal entity for prosecution. Therefore, a charge framed under the Act in the name of a firm was void in law since it was not recognised as being a legal entity for prosecution purposes. (paras 31, 34 & 36)

(6) Article 145(3) of the Federal Constitution and s. 376 CPC confers wide discretionary powers on the Public Prosecutor to institute proceedings. By virtue of s. 45 of the Act read with art. 145(3) Federal Constitution and s. 376(3A) CPC, the prosecution in the court below in the name of the JPJ and without the written appointment under ss. 376(3A) & 377(b) CPC by the Public Prosecutor renders the prosecution of the respondent a nullity and void *ab initio (Rajendran M Gurusamy v. PP*; foll). (paras 42 & 47)

Case(s) referred to:

Chia Foon Tau & Anor v. Lim Pey Lin [1997] 4 CLJ Supp 211 HC ***(refd)***
Dorai Manickam Alias David v. Rex [1936] 1 LNS 12 HC ***(refd)***
Keow Seng & Co v. Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered [1983] 1 LNS 18 FC ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 CA ***(refd)***
Muzammil Izat Hashim v. PP [2009] 2 CLJ 354 ***(refd)***
PP v. Bata (M) Bhd [2000] 3 CLJ 433 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Rajendran M Gurusamy v. PP [2001] 1 CLJ 631 HC ***(foll)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***
Wong Yoon Yar v. Lin Yin Thai & Ors [1987] 1 LNS 21 SC ***(refd)***

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, ss. 2, 19(1)(b)(vi), (3), (4), 20A, 43(3), 45
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 323, 325, 376(1), (3), (3A), 377(b)
Federal Constitution, art. 145(3)

Other source(s) referred to:

Words, Phrases & Maxims, Legally & Judicially Defined, vol 7, paras F0447 & F0448, p 253

For the appellant - Hairun Najmi Mashahadi DPP
For the respondent - Henry Ling; M/s Ling & Wong

Reported by Kumitha Abd Majid

JUDGMENT

John Ko Wai Seng JC:

The Case

The Charge

[1] The respondent firm was charged by Jabatan Pengangkutan Jalan (JPJ) for an offence under s. 19(1)(b)(vi) read with s. 19(4) of the Commercial Vehicles Licensing Board Act 1987 (the "Act").

The charge read as follows:

> Bahawa kamu pada 20.7.2010 jam lebih kurang pukul 1140 HRS di JPJ Bintulu dalam daerah Bintulu dalam Negeri Sarawak sebagai pemilik kenderaan perdagangan jenis semi trailer kargo nombor pendaftaran QSJ 2589, telah membenarkan pemandu memandu kenderaan tersebut di atas jalanraya dengan membawa muatan sebanyak 46700 Kg iaitu lebih muatan sebanyak 14700 Kg (45.94%) daripada had berat dengan muatan yang dibenarkan sebanyak 32000 KG. Dengan demikian kamu telah melakukan kesalahan di bawah Seksyen 19(1)(b)(vi) Akta Lembaga Perlesenan Kenderaan Perdagangan 1987 dan boleh dihukum dibawah Seksyen 19(4) Akta yang sama.

Loosely translated in English:

> That you on 20.7.2010 at about 1140 hrs at JPJ Bintulu, in the State of Bintulu Sarawak as owner of a transport vehicle being one semi trailer lorry bearing registration number QSJ 2589, had permitted the driver to drive the vehicle on the public road with laden weight of 46700 Kg which overloading amounting to 14700 Kg (45.94%) than the authorized weight amounting to 32000 Kg and thereby you had committed an offence under Section 19(1)(b)(vi) punishable under Section 19(4) of the Commercial Vehicles Licensing Board Act 1987.
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> Punishment: Fine of not less than RM1,000, not more than RM10,000 or imprisonment of not less than 1 year or both."

The Acquittal And Application For Revision

[2] On 13 January 2011, the learned magistrate had discharged and acquitted the respondent after hearing preliminary objection by the learned counsel for the respondent. A notice of appeal was filed on 26 January 2011 and it was withdrawn on 6 July 2011. The prosecution had then applied for a criminal revision against the learned magistrate's decision.

The Grounds For Revision

[3] The appellant applies for revision of the learned magistrate's decision based on the following grounds:

(a) The learned magistrate erred in fact and law when he held that both the manager and the driver were charged for the same offence under the Act from the same facts in the charges lodged against them.

A (b) The learned magistrate erred in fact and law when decided that the subsequent charge against the accused (manager of the firm) amounted to double jeopardy.

The Issues

B *Application By Way Of Criminal Revision*

[4] The appellant had made the application by way of criminal revision to this court after they had withdrawn their notice of appeal. The appellant has relied on ss. 323 and 325 of the C Criminal Procedure Code (CPC) read with s. 35 of the Court of Judicature Act 1964 requesting the court to call for and examine the record of the proceedings of the learned magistrate.

[5] The respondent contends that the decision complained of is D appealable but it was neglected and that in a criminal revision, the court should not be confined to certain issues as may be picked out advantageously to an applicant. In other words the respondent should be allowed to advance further grounds to support their preliminary objection below that the learned E magistrate's decision to acquit is sound in law.

[6] The respondent further submits that it is a well settled law that the power of revision is to be used sparingly and a discretionary power is to be exercised primarily for purposes of correcting a miscarriage of justice. As there is no miscarriage of F justice, the request for revision in this case if allowed will inflict an injustice to the proprietor of the respondent.

[7] The respondent relied on the case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163. There the G applicants pleaded guilty and were convicted in a magistrate's court. There was no appeal against the sentence by the applicants or by the public prosecutor. However, the applicants were summoned by the high court to appear before it for a revision. The learned judge enhanced the sentence. The Supreme Court H quashed the enhanced sentence and held as follows at p. 164a:

> The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

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See also *Muzammil Izat Hashim v. PP* [2009] 2 CLJ 354; *Public Prosecution v. Raymond Chia Kim Chwee & Anor & Another Case* [1984] 2 CLJ 457; [1985] CLJ (Rep) 260; *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209; *Dorai Manickam Alias David v. Rex* [1936] 1 LNS 12.

[8] Section 325 of CPC states that a judge may exercise his discretionary powers in any case of the record of the proceedings of which has been called for or by himself or which otherwise comes to his knowledge, but a judge cannot convert a finding of acquittal into one of conviction.

[9] The court sees no reason for not considering this revision in view of the issues raised from the facts of this case and will exercise its discretion under s. 325 of CPC to consider the issues raised.

Double Jeopardy: Grounds 1 And 2

[10] The respondent as owner of the transport vehicle was charged under s. 19(1)(b)(vi) punishable under s. 19(4) of the Act for breach of the road transport licence condition. The driver of the lorry was also earlier been charged for an offence under s. 19(1)(b)(vi) punishable under s. 19(4) of the Act and had pleaded guilty and was fined RM1,500 for the offence.

[11] Section 19(1)(b)(vi) of the Act states that:

> (1) Subject to this Act, the Board may attach to any licence granted under this Act such conditions as it may think fit and in particular:
>
> (b) in relation to a goods vehicle licence:
>
> (vi) that the laden weight of any authorised vehicle shall not exceed a specified maximum;

[12] Section 19(4) of the Act states that:

> (4) In the case of a vehicle used for the transportation of goods and in respect of which a licence under this Act has been issued, the holder of the licence or any other person who causes or permits the vehicle to be used by any person shall, if the person who uses the vehicle fails to comply with any of the conditions attached to the licence under this

A section, be guilty of an offence and shall on conviction be liable to a fine of not less than one thousand ringgit but not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

B **[13]** Learned counsel for the respondent submitted since the driver of the lorry had been charged under s. 19(1)(b)(vi) of the Act and fined RM1,500 under s. 19(4) of the Act therefore the owner of the vehicle should not be charged on the same facts for the same offence as it amounts to double jeopardy.

C **[14]** The appellant submitted that there are four different heads of offences under s. 19(4) of the Act which are as follows:

Head (a): Person who fails to comply with the condition attached to the licence issued under the Act;

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Head (b): Person who permits or cause the vehicle to be used by person who fails to comply with the condition attached to the licence under the Act;

Head (c): Holder of the license who fails to comply with the
E condition of licence issued under the Act; and

Head (d): Holder of the license who permits or cause the vehicle to be used by person who fails to comply with the condition attached to the licence under
F the Act.

[15] The appellant submitted that there was no double jeopardy as the respondent who is the owner of the transport vehicle was charged for an offence under s. 19(4) of the Act for allowing the
G driver to breach the conditions of the road transport licence by the overloading (under head b) which is different from the charge against his lorry driver which was under s. 19(1)(b)(vi) of the Act for overloading in breach of the condition of the road transport licence (under head a). The respondent and its lorry driver are two
H different persons and both were charged for different kind of offences under two heads of s. 19(4) of the Act.

[16] The court disagrees with learned DPP's interpretation of s. 19(4) of the Act that it creates four offences as listed under the above four heads.

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[17] In *Muhammed Hassan v. PP* [1998] 2 CLJ 170, Chong Siew Fai CJ (Sabah & Sarawak) on the interpretation of the penal provisions said this at p. 189:

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss. (d) and (da) of s. 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v. PP* [1968] 1 LNS 180; [1968] 2 MLJ 1 PC; *PP v. Leong Kuai Hong* [1981] 1 LNS 4; [1981] 1 MLJ 246 FC; see also *Stephenson v. Higginson* [1851] 3 HL Cas 638 where Lord Truro observed: (p. 686)
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> > ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense, must plainly appear.

[18] Applying the literal interpretation to s. 19(4) of the Act, the default to be punished being for allowing a person to breach the conditions of the road transport license. Therefore the person to be punished is either (i) the Licenceholder or (ii) the person who allows the person to breach the licence conditions and not even to both. The court is of the view that the "or" in "the holder of the license or any other person who causes or permits the vehicle to be used" cannot be read as an "and" to make both liable.

[19] In *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713, Steve Shim CJ (Sabah & Sarawak) in the Federal Court reiterated at p. 747e-f that the principle that the primary duty of the court is to give effect to the intention of the Legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in there ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such cases best declare the intent of the law giver. (p. 747e-f)

[20] In the same case, Abdul Malek Ahmad PCA explained this at p. 743:

> Also, generally speaking, if the words in a statute admit two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

[21] Applying this favourable interpretation for the accused, the use of the phrase "if the person who uses the vehicle fails to comply with any of the conditions attached to the licence under this section" cannot also be liberally read as "together with the person who uses the vehicle fails to comply with any of the conditions attached to the license under this section." The user created the offence by his breach of the condition to cause the licenceholder or the party allowing him to breach become the two targeted offenders, the user does not offend this provision. The phrase "if" as quoted was used to identify the two possible offenders to be charged because they were the ones "who causes or permits the vehicle to be used by any person". Section 19(4) as framed was not meant to include the person or user who actually breaches the conditions but rather against the licenceholder or the manager/director/proprietor who causes or permits the use by any person who then breached the licence condition.

[22] The court would opine to avoid double jeopardy that the driver or user if not the licenceholder or manager/director/proprietor should be appropriately charged under s. 19(3) of the Act which incidentally provides for an identical penalty:

> (3) The holder of the licence or any person using, causing or permitting the use of a vehicle in respect of which a licence has been issued under this Act, who fails to comply with any of the conditions attached to the licence under this section shall be guilty of an offence and shall on conviction be liable to a fine of not less than one thousand ringgit but not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[23] As such there has been double jeopardy by the lodging of two charges under s. 19(4) of the Act on the one act of overloading against the owner and the driver who presumably is the manager who authorized and permitted himself to drive and has breached the overloading condition. The facts upon which their respective offences under s. 19(4) of the Act were formulated arising from the same one breach by the user are the same even though against two different parties will be double jeopardy. There can be one punishment under s. 19(4) of the Act for one breach and not four as contemplated by the submission of learned DPP.

[24] The learned magistrate has not erred in law by allowing the preliminary objection of the respondent based on double jeopardy to discharge and acquit the respondent on the basis that there is already a conviction for the same offence from the same breach of condition.

Whether A Firm Can Be Prosecuted?

[25] Learned counsel for the respondent submitted that Cang Cheng Transport Co is not a legal entity in law. The undisputed fact is that Gang Cheng Transport Co the licence holder of that lorry bearing registration No. QSJ 2589 the goods vehicle in question is not a legal entity.

[26] Learned counsel for the respondent had succinctly laid out the law on this by first citing *Words, Phrases & Maxims, Legally & Judicially Defined*, vol. 7, at p. 253 (para. F0447) which defined a firm as follows:

> A firm is an unincorporated body of persons (whether consisting of individuals or of corporations or partly of individuals and partly of corporations) associated together for the purpose of carrying on a business.

[27] On the expression of "Firm Name", the same book also at p. 253 (para. F0448) states as follows:

> The word 'firm' or 'firm name' is merely a compendious description of all the partners collectively. *Purushottam & Co v. Manilal & Sons* AIR [1961] SC 325 AIR [1961] SC 328 (Indian Partnership Act 1932 Sec 4)

[28] In *Wong Yoon Yar v. Lin Yin Thai & Ors* [1987] 1 LNS 21; [1987] 2 MLJ 714, the Supreme Court at p. 715 (per Lee Hun Hoe CJ (Borneo) said this:

> We would like to make one observation on the legal status of a firm or 'chop' tenant as loosely described by many in this country. There is still a popular misconception prevalent amongst illiterate trademen in the country that a firm or 'chop' is an entity. That is not so. Unlike a company registered under the Companies Act which is itself a legal entity, a firm or 'chop' although it may be registered under other legislation is nothing more than a convenient name or label for a number of persons carrying on a business in a partnership or for that matter for a sole proprietor

A carrying on business. Those persons could use their own individual names if they wished followed by some such names if they wished followed by some such words as 'trading under the style of' whenever they transacted any business. But this might well be inconvenient, especially if they were numerous partners. The obvious solution is to select one short name to include all B partners. That is the 'chop' name. The same situation applied to a sole proprietor. He may not wish to carry on business in his own name but prefer to choose something more colourful or meaningful to bring luck and prosperity to his business. So, he chooses a 'chop' name and trades under that. But he does not C by this so doing create an entity separate from himself.

[29] In *Keow Seng & Co v. Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 1 LNS 18, the Federal Court (per Raja Azlan Shah LP, as HRH then was) referred to the D decision of the English Court of Appeal in *Western National Bank of City of New York v. Perez, Triana & Co* at p. 105 held:

> When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used ...

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[30] In *Chia Foon Tau & Anor v. Lim Pey Lin* [1997] 4 CLJ Supp 211, Suriyadi J, as he then was, at p. 215 held this:

> Under English law, which is not dissimilar from that of Malaysia, a partnership or firm is not a person or legal entity although the F firm may sue and be sued in the firm's name. Farwell LJ in *Sadler v. Whiteman & Anor* [1910] 1 KB 868 at page 889 had this to say:
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> > The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law, a firm as G such has no existence; partners carry on business both as principles and as agents for each other within the scope of the partnership business; **the firm name is a mere expression, not a legal entity**, although for convenience under O. XLVIIIA, it may be used for the sake of suing H and being sued. (Hamilton J at p. 487 endorsed this view in *The King v. Holden* [1912] 1 KB 483; 35 *Halsbury's Law of England* (4th Edition 35 page 3)
> >
> > (emphasis added)

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[31] For a firm, the person in charge of the firm is the proprietor, not the manager. In the instant case, the licence holder and proprietor of the firm was and still is at the time staying in Kuching. In this case, the prosecution was instituted against the firm with no identification of any natural person who was accused to be responsible for the *'mens rea'* and the *'actus reus'* of the alleged offence in the charge yet. However, the holder of the licence could be the registered owner, be it a company, corporation or firm. It is presumed that the legislature knows the law of partnership or a firm and the case law in existence at the time it enact the statute. A firm is an unincorporated association of persons of which whoever a proprietor who commits an offence should be prosecuted personally for it.

[32] Looking at the scheme of the Act in particular to ss. 2 and 20A of the Act, the Court notes that a road transport licence can be validly issued to a firm like the respondent:

> 2. Interpretation
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> In this Act, unless the context otherwise requires:
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> "Company" includes any company as defined in the Companies Act 1965, any company formed under any law, any corporation incorporated by law, and any firm or partnership;
>
> 20A. Application for approval to participate in business or agreement
>
> (1) **If the holder of a licence that is a company or a partnership or a firm** intends to participate in any business or agreement that would business or cause:
>
> (emphasis added)

[33] The court agrees with the general proposition expounded by learned counsel for the respondent that as the law stands a firm is not a legal entity and has no legal standing in law. However since the Act permits a non-legal entity like the firm to be registered as the owner as to give it a legal entity status it is necessary to look if the Act provides for charging in the firm's name.

[34] After reviewing the provisions of the Act, the court finds that there is no specific provision in the Act to allow a firm to be charged in its own name in order to constitute it as a legal entity

for prosecution. As such, the better practice is for the sole proprietor or the managing partner of a licenceholder in such a case to be charged in their personal name for an offence under s. 19(4) as the person who causes or permits the driver to breach the licence condition. The court believes that the law was framed like this to recognise the non legal entity status of a firm as a licenceholder. It is significant that s. 43(3) of the Act only provides for a partner to be made liable for his act if it amounts to an offence for the Licenceholder firm which is the reverse of what is required, ie, by providing that a firm can be charged in its registered name and that the sole proprietor or the dominant partner or a partner in charge will be the party responsible and liable to answer to the charge in the firm's name. This would overcome the common law position of a firm as not being a legal entity to be sued or prosecuted.

[35] We have to always remember that the firm being a non legal entity in law cannot have *mens rea*. True, artificially *mens rea* has been attributed to a company registered under the Companies Act 1965 or bodies corporate by means of alter egos in the form of the *mens rea* of its director or secretary or officers but there is no corresponding law like the Companies Act 1965 to support such an artificial imposition for firms comprising of sole proprietorship or partnerships which unfortunately was not achieved by a provision in s. 43 of the Act.

[36] The court would consider by the provisions of the Act as promulgated because a firm even if a registered licenceholder is not recognised as being a legal entity for prosecution purposes results in a charge framed under the Act in the name of a firm as void in law.

Consent To Prosecute: Proceedings A Nullity Or Defective Ab Initio

[37] The respondent lastly contends that the proceedings was a nullity because the JPJ officers who initiated the proceedings in the name of "Jabatan Pengangkutan Jalan" did not produce any written authority to the learned magistrate to prove that they are fit and proper person appointed by the Public Prosecutor to prosecute any offence under the written law.

[38] Section 45 of the Act on who may prosecute for any offence states as follows: A

> Proceedings for an offence under this Act shall not be instituted or conducted except **by or on behalf of the Public Prosecutor**, by a police officer or a road transport officer. (emphasis added) B

[39] Article 145(3) of the Federal Constitution provides:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a native court or a court-martial. C

[40] Section 376(1), (3) and (3A) of the CPC provides as follows:

> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code. D
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> (3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors. E F
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> (3A) The Public Prosecutor may appoint fit and proper persons to be Assistant Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and, subject to such limitations or restrictions as may be specified by the Public Prosecutor, shall have all the powers of a Deputy Public Prosecutor. G

[41] The respondent submitted that the public prosecutor has the power to institute, conduct or discontinue prosecutions. As such the prosecution so instituted and conducted by JPJ in their own name against the firm without any written authority is void *ab initio*, ie, from the beginning because of s. 376(3A) CPC. H

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[42] Article 145(3) of the Federal Constitution and s. 376 of the CPC confer wide discretionary powers on the public prosecutor to institute proceedings. The term "conduct" was considered by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92 and he said that:

> Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (In *re Bhupalli Malliah* (AIR [1959] AP 477) Pride of Derby v. British Celanese Ltd [1953] 1 Ch 149 at page 167). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the courts of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respects to the evidence.

[43] The respondent cited the case of *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740, where Gopal Sri Ram JCA, as he then was, at p. 746b considered art. 145(3) of the Federal Constitution in the light of s. 376 CPC and other aspects of the law on the institution and conduct of the prosecution of offences, held:

> ... from a reading of the plain language of art. 145(3), that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney-General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings." The phrase "institute, conduct or discontinue" was considered by Abdoolcader J. (as he then was) in *Public Prosecutor v. Datuk Hj Harun bin Hj Idris & Ors* [1976] 2 MLJ 116.

Gopal Sri Ram JCA, went on to add at p. 747a *(Ibid)*:

> Abdoolcader J's interpretation of the phrase "institute, conduct or discontinue" was approved and applied by the Federal Court in *Public Prosecutor v. Lim Shui Wang & Ors* [1979] MLJ 65.
>
> It follows from the foregoing discussion, that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney-General as Public Prosecutor. The adjectival vehicle contained in s. 376 and subsequent sections of the Criminal Procedure Code put this beyond doubt.

(See also *PP v. Bata (M) Bhd* [2000] 3 CLJ 433, Low Hop Bing J, at p. 438b-c)

[44] Section 377(b) of CPC clearly indicated that every criminal prosecution before any court and every inquiry before a magistrate in any case where the public prosecutor has given his written authority is still under the control and direction of the public prosecutor if conducted by an advocate, a police officer not below the rank of Inspector, an officer of any government department, an officer of any statutory authority or body or any person employed or retained by any local authority or any statutory authority or body which includes the JPJ.

[45] In the case of *Rajendran M Gurusamy v. PP* [2001] 1 CLJ 631 Abdul Wahab Patail J had held:

> With regard to the institution of criminal prosecutions the position is clear that where there is no mechanism for issue of sanction or consent by the attorney general to signify authorization under art. 145(3) to institute criminal proceedings, some form of authorization must be employed to show authorisation. The suggestion in *PP v. Pengurus*, MBf Building Services Sdn Bhd, should be adopted, since if there is no evidence of such authorisation, the magistrate or Sessions Judge, other than in a case where the attorney general personally appears, has no evidence or basis to hold the criminal proceeding is properly instituted.

[46] Learned DPP cited the case *Rajendran M Gurusamy v. PP* [2001] 1 CLJ 631, where the high court reviewed the magistrate's decision in allowing the proceedings to proceed while the proper authorization was being acquired as valid is distinguishable from this case. The proceeding before the magistrate's court here has been terminated by the case being dismissed without production of the authority before the magistrate court for the record. The court is of the view even if this criminal revision is now made by the public prosecutor implying sanction to the prosecution of these proceedings will not be valid to sanction retrospectively what has been concluded before the magistrate court based on *Rajendran*'s case *(supra)*.

[47] The court agrees with *Rajendran*'s case *(supra)* that by virtue of s. 45 of the Act read with art. 145(3) of the Federal Constitution and s. 376(3A) of the CPC, the prosecution in the court below in the name of the Jabatan Pengangkutan Jalan

against the firm and without the written appointment under ss. 376(3A) and 377(b) of the CPC by the public prosecutor placed before the magistrate renders the prosecution of the respondent a nullity and void *ab initio*.

Conclusion

[48] The Criminal Revision is disallowed and dismissed on the grounds that:

(a) The charging of the driver under s. 19(4) of the Act for breach of the conditions of the terms of the licence and the charging of the licence-holder for the same offence for the driver's breach of the conditions of the terms of the licence is double jeopardy;

(b) The failure of JPJ to produce authorization under s. 376(3A) CPC renders the prosecution null and void; and

(c) A charge framed under the Act in the name of a firm as the registered licenceholder because it is not recognised as a legal entity by the Act to be prosecuted is void in law.